IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 7471 OF 2004

Videocon Appliances Ltd., .. Petitioners.

vs.

Maker Chambers V Premises

Co-op. Socy. Ltd, & Ors. .. Respondents.

Mr. Firdosh Pooniwala with Mr. Kalpesh Joshi i/by M/s. Malvi Ranchhoddas & Co. for petitioners.

Mr. F.E. Divetre, Sr. Counsel, with Mr. Shyam Mehta & Mr. Ajay Fernandes i/by M/s. Federal & Rashmikant for respondent.

CORAM : S.U. KAMDAR, J.

DATE : 1st December, 2005.

ORAL JUDGMENT :

. The present petition raises an issue whether under the provisions of Section 154 of the Maharashtra Cooperative Societies Act, 1960 a power can be exercised to entertain a second revision application. Before I deal with the aforesaid issue for the purpose of narration, few facts of the present case are necessary which are briefly

enumerated as under:-

2. In 1984 a builder constructed a building known as Maker Chambers V at Nariman Point, Bombay. The plans in respect of the said building were approved upto 15th floors and in 1981 a plan for 16th floor was also approved. The premises in the subject matter of the present case is premises no. 1601 which are situated at the 16th floor of the said building. It is the case of the petitioner that by 1980 all the 15 floors of the building were sold by the builder to the various purchasers of the said premises and on 2.7.1985 the occupiers of the said premises have formed a society known as Maker Chambers V Premises Co-operative Society Ltd., being the respondent no. 1 herein. However, prior to the said society could be incorporated, the builder has got the plan sanctioned for the 16th floor and constructed the 16th floor on the said building. In 1991 in respect of the office no. 1601, the builder became the member of the respondent society. On 16.4.1992, the builder sought to sell the premises to one Jayantilal Khandwala & Sons being the premises no. 1601 along with two car parkings for total consideration of Rs. 3.51 crores. However, the Income-tax Authorities under the provisions of Section 269UD(I) of the Income-Tax Act, 1961 intervened and took over the said premises. In the meantime, it seems that on 24.7.1992 the respondent

no. 1 society filed a dispute in the Co-operative Court against the builder and the Income-tax Authorities in respect of the said office premises and terrace attached thereto. The respondent society also filed a writ petition in this Court being Writ Petition No. 4232 of 1992 challenging the order passed by the Co-operative Court in the said proceedings. The said writ petition is pending. The respondent no. 1 has also filed a civil suit being Suit No. 659 of 1993 on the original side of this Court inter alia seeking a declaration that the builder had no right to put up any construction on the common terrace on the 16th floor of the building without prior consent being obtained from all the premises purchasers under Section 7 of the Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963, (hereinafter referred to as The Maharashtra Ownership Flats Act, 1963). No interim orders are passed in the said proceedings and the said suit is still pending. The Income-tax Authorities thereafter placed the said premises on auction and the petitioner purchased the said premises in auction for a sum of Rs. 4.037 crores on 16.12.1992. On 14.9.1993 the Income-tax Authorities has executed necessary deed of transfer in favour of the petitioners. On 26.8.1993 the Petitioners forwarded the application for being made a member of the 1st respondent society in respect of

the premises bearing no. 1601. The Petitioners also filed various forms in favour of the 1st respondent society calling upon them to transfer the said premises. On 18.11.1993 the 1st respondent addressed a letter calling upon the petitioners to furnish certain documents and holding that the application will be considered only on compliance with the said requisition. On 22.11.1993, the petitioners completed the requirements by forwarding the necessary documents and calling upon the society to transfer the said membership from the builder in his favour. On 26.4.1994 a deed of rectification was entered into between the Income-tax Authorities and the respondent wherein the mistake in the area was rectified. The correspondence went on between the petitioner and the respondent for the purpose of transfer of the said membership. After a considerable correspondence, in or about January, 1998 the petitioner filed an application before the 2nd respondent seeking a declaration that the petitioner was a deemed member of the 1st respondent society and also seeking an order that the respondent no. 1 should be directed to admit the petitioner as a member in respect of the said premises being premises no. 1601 and transfer the shares and the membership in favour of the petitioner. On 12.3.1998, the respondent no. 1 filed a reply, inter alia, contending that the petitioner is not entitled to deemed membership

because in fact the membership of the petitioner has been refused by the respondent society by a letter dated 18.11.1993. The relevant averments in para 3 of the said reply read as under :-

> "3. Without prejudice to the aforesaid contentions, the Respondent submits that by its letter dated 18.11.1993 which was given by the Respondent Society to the Applicants within a statutory period of three months, the application of the Applicants was in terms refused since in para 2 thereof it was clearly indicated that the application of the Applicants cannot be considered. The said letter is in fact Exhibit "D" to the instant application. The remedy for the Applicants was therefore to file an appeal under Section 23 and not an application under Section 22 (2) of the Maharashtra Co-operative Societies Act, 1960. Thus, this application is totally misconceived and untenable in law and therefore requires to be summarily dismissed in limini with cost."

3. The matter was thereafter heard by the Deputy Registrar and by an order dated 8.5.1998 the Deputy Registrar, Co-operative Societies, allowed the said application/appeal and directed the respondent no. 1 society to make the petitioner as

a member. Against the said order, a revision was filed under Section 154 Maharashtra Cooperative Societies Act, 1960 before the Divisional Joint Registrar, Co-operative Societies, Bombay and by an order dated 6.9.2001 the revision application of the society has been allowed and the order passed by the Deputy Registrar, Cooperative Societies directing the respondent to make the petitioner as a member in respect of the premises No. 1601 has been set aside. The petitioner preferred a second revision before the Secretary (Co-operation), Government of Maharashtra by exercising power under the provisions of Section 154 of the Act and by an order dated 3.3.2004, the Secretary (Co-operation), Government of Maharashtra has dismissed the said application as not maintainable against the revisional order passed by the Divisional Joint Registrar, Co-operative Societies, Bombay.

4. Being aggrieved by the said order, the petitioner has filed the present writ petition challenging the order passed by the Secretary (Co-operation), Government of Maharashtra as well as challenging the order passed by the Divisional Joint Registrar allowing the appeal of the respondent no. 1 and setting aside the order passed by the Dy. Registrar directing the respondent society to make the petitioner as a member.

5. In so far as the maintainability of second revision is concerned, the learned counsel appearing for the petitioner has contended that in the light of the judgment of the Supreme Court in the case of Ishwar Singh vs. State of Rajasthan and others, reported in (2005) 2 SCC 334 that the second revision is maintainable. It has been contended that the Hon'ble Supreme Court was considering the identical provisions of the Rajasthan Cooperative Societies Act, 1965 which is Section 128 of the said Act and has held that the power conferred on the Joint Registrar and the State Government is concurrent and not alternative and, therefore, a second revisionary power can be exercised under the very same provision of revision under section 128 of the Rajasthan Cooperative Societies Act, 1965. The learned counsel has particularly relied upon paras 13 and 14 of the said judgment to contend that the second revisionary power can be made applicable. The learned counsel for the petitioner has also contended that in light of the recent judgment of the Supreme Court in the case of Ishwar Singh vs. State of Rajasthan and others (supra) all the earlier judgments of this Court which have taken a consistent view that under Section 154 of the Maharashtra Cooperative Societies Act, a second revision is not available and the power of second revision cannot be exercised by the State Government are impliedly overruled and thus cannot be

considered. The respondent society on the other hand has brought to my attention the judgments of the learned Single Judges of this Court, particularly the unreported judgment of Lodha, J. in W.P. No. 4180 of 1998 dated 18.2.1999, the judgment in the case of Bhupendra Villa Premises Co-operative Society Ltd., and another vs. Chandrakant G. Shah and others, reported in 2001 (2) Mh.L. J. 834. a judgment of another learned Single Judge in the case of Shri Ramesh T. Gopalani vs. The Janata Sahakari Bank Ltd., and another, reported in 2000 (3) Bom. C. R. 474, a judgment of another learned Single Judge in the case of Virendra Bhanji Rathod and others vs. Anand Vihar Co-operative Housing Society Ltd., Mumbai and others, reported in 2004 (1) Mh.L.J. 656 and lastly the judgment of another learned Single Judge in the case of Dadar Avanti Co-operative Housing Society Ltd., vs. State of Maharashtra & Ors., reported in 2005 (2) Bom. C.R. 604. Each of the aforesaid judgment have taken a consistent view that the power of revision under Section 154 of the Maharashtra Cooperative Societies Act, 1960 cannot be exercised twice over and once the power having been exercised by the Registrar or the Secretary, the said power is exhausted and revision against the order of Registrar in exercise of revisionary power under Section 154 is not maintainable before the Secretary and/or Minister of Co-operation of the State of

Maharashtra under very same provision of law. The view has been consistently taken that the power of revision can only be exercised once and cannot be exercised twice over under section 154 of the Act. However, the larned counsel for the petitioner has vehemently contended that the aforesaid views are all impliedly overruled by the recent judgment of the Apex Court in the case of Ishwar Singh vs. State of Rajasthan and others (supra). I have considered the judgment of the Supreme Court in the case of Ishwar Singh vs. State of Rajasthan and others (supra). Firstly, in my opinion the said judgment has no application because the provisions of Section 128 of the Rajasthan Cooperative Societies Act, 1965 is in para materia different to the provisions of the present case. The power under section 128 is simultaneously conferred on the Government and the Registrar because the opening words of the provisions of Section 128 reads as under :-

> "The State Government and the Registrar may call for and examine the record of any enquiry or proceedings of any other matter."

In contrast to the same, the provisions of section 154 does not give a concurrent jurisdiction to the Registrar and the State Government because the words prescribed thereunder are "the State Government or

the Registrar may call for and examine the records." The wording in that section by substitution of the word "or" in place of "and" is materially significant because in case where the word "and" is used is a coinjoint power conferred both on the Registrar as well as the Government whereas the word "or" indicates that it is the power conferred on 'either' or 'or' in such cases the power cannot be exercised by both but it can be exercised by one of the two and in that view of the matter, I am not inclined to accept the contention that by virtue of the judgment of the Apex Court in the case of Ishwar Singh vs. State of Rajasthan and others (supra) all the learned Single Judges judgments of this Court interpreting the very section 154 are deemed to be impliedly overruled. Thus,the contention that the order passed by the Secretary holding that the second revision is not maintainable is bad in law is rejected. The order passed by the Secretary holding that the second revision is not maintainable is upheld.

6. Now, this takes me to the next issue whether the order passed in revision by the Divisional Joint Registrar is valid in law or not because the petitioner has in the alternative challenged the said order passed by the Divisional Joint Registrar dated 6.9.2001.

7. The second contention raised by the petitioner is that the petitioner is entitled to become a member as he is the purchaser of the property in the auction sale held by the Income-tax authority. It has been contended that though it is no doubt true that the said sale is on 'as is where is' basis but it takes into detailed account the right of the person to apply for a membership and if found suitable and in compliance with the rules and regulations provided by the Act, he is entitled to be the member. The learned counsel for the petitioner has contended that the Divisional Registrar has erred in the matter while holding that the petitioner is not entitled to become member of the society because the construction of 16th floor is contrary to and in breach of Section 7 of the Maharashtra Ownership Flats Act, 1963 is totally erroneous and illegal and, therefore, is liable to be quashed and set aside and the order of the Deputy Registrar dated 8.5.1998 must be upheld.

8. On the other hand, Mr. Divetre, the learned senior counsel appearing for the respondent society has contended that the order passed in revision is legal and valid. He has contended that the only ground on which an application has been made by the petitioner to the Deputy Registrar is under the provisions of section 22 (2) of the Maharashtra Cooperative Societies Act, 1960 on the basis of a

deemed membership and not on the basis that there is an unlawful refusal and an application is preferred therefrom as contemplated under section 23 (2) of the Maharashtra Cooperative Societies Act, 1960. It has been thus contended that on the facts of the present case when there are various details sought for though more than a 60 days period expired on filing the application, the application being not complete the period cannot run and, therefore, there was no question of deemed membership. It has been contended that the Deputy Registrar was in error in going into the merits of the matter and holding that the refusal of the membership by the respondent society was illegal and unlawful and exercising power under section 23 (2) of the Maharashtra Cooperative Societies Act when in particularly the application itself was only under section 22 (2) of the Maharashtra Cooperative Societies Act on the ground of deemed membership. The learned counsel has therefore urged that the Divisional Joint Registrar has therefore rightly interfered with the order passed by the Deputy Registrar and has rightly set aside the said order and has refused the membership of the petitioner to the respondent no. 1 society.

9. My attention has been drawn by the learned counsel for the respondent to the provisions of Section 22 and 23 of the Maharashtra Cooperative

Societies Act, which read as under :-

"22. Person who may become member.

(1) Subject to the provisions of section 24, no person shall be admitted as a member of a society except the following, that is to say--

(a) an individual, who is competent to contract under the Indian Contract Act, 1872;

(b) a firm, company or any other body corporate constituted under any law for the time being in force, or a society registered under the societies Registration Act, 1860;

(c) a society registered, or deemed to be registered, under this Act;

[(d) the State Government or the Central Government;]

(e) a local authority;

(f) a public trust registered under any law for the time being in force for the registration of such trusts;

Provided that, the provisions of clause (a) shall not apply to an individual seeking admission to a society exclusively formed for the benefit of students of a school or college;

Provided further that, subject to such terms and conditions as may be laid down by the State Government by general or special order, a firm or company may be admitted as a member only of society which is a federal or urban society or which conducts or intends to conduct an industrial undertaking;

Provided also that, any firm or company, which is immediately before the commencement of this Act, a member of a society deemed to be registered under this Act, shall have, subject to the other provisions of this Act, the right to continue to be such member on and after such commencement.

Explanation.-- For the purpose of this section "an urban society" means a society the business of which mainly falls within the limits of a municipal corporation, municipality, cantonment or notified area

committee.

(1A) Notwithstanding anything contained in sub-section (1), the State Government may, having regard to the fact that the interest of any person or class of persons conflicts or is likely to conflict with the objects of any society or class or societies, by general or special order, published in the Official Gazette, declare that any person or class of persons engaged in or carrying on any profession, business or employment shall be disqualified from being admitted, or for continuing, as members or shall be eligible for membership only to a limited extent of any specified society or class of societies, so long as such person or persons are engaged in or carry on that profession, business or employment [as the case may be; and the question whether a person is or is not so engaged in or carrying on any profession, business or employment or whether a person belongs or does not belong to such class of persons as declared under this sub-section and has or has not incurred a disqualification under this sub-section shall be decided by the Registrar under section 11.

[(1B) Notwithstanding anything contained in sub-section (1), where the Registrar has decided under section 11 that a person has incurred a disqualification under sub-section (1A), the Registrar or the person not below the rank of District Deputy Registrar of Co-operative Societies, authorised by him in this behalf, may, by order, remove such person from the membership of the society; and such person shall cease to be a member of the society on expiration of a period of one month from the date of receipt of such order by him.]

(2) Where a person is refused admission as a member of a society, the decision (with the reasons therefor) shall be communicated to that person within fifteen days of the date of the decision, or within three months [from the date of receipt of the application for admission, whichever is earlier. If the society does not communicate any decision to the applicant within three months from the date of receipt of such application the applicant shall be deemed to have been [admitted] as a member of the society.] [If any question arises whether a person has become a deemed member or otherwise, the same shall be decided by the Registrar after

giving a reasonable opportunity of being heard to all the concerned parties.]

23. Open membership.

(1) No society shall, without sufficient cause, refuse admission to membership to any person duly qualified therefor under the provisions of this Act and its by-laws.

[(1A) Where a society refuse to accept the application from an eligible person for admission as a member, or the payment made by him in respect of membership, such person may tender an application in such form as may be prescribed together with payment in respect of membership, if any, to the Registrar, who shall forward the application and the amount, if any so paid, to the society concerned within thirty days from the date of receipt of such application and the amount; and thereupon if the society fails to communicate any decision to the applicant within sixty days from the date of receipt of such application and the amount by the society, the applicant shall be deemed to have become a member of such society.] [If any question arises whether a person has become a deemed member or

otherwise, the same shall be decided by the Registrar after giving a reasonable opportunity of being heard to all the concerned parties.

(2) Any person aggrieved by the decision of a society, refusing him admission to its membership, may appeal to the Registrar. [Every such appeal, as far as possible, be disposed of by the Registrar within a period of three months from the date of its receipt;

Provided that, where such appeal is not so disposed of within the said period of three months, the Registrar shall record the reasons for the delay.]

(3) The decision of the Registrar in appeal, shall be final and the Registrar shall communicate his decision to the parties within fifteen days from the date thereof.

(4) Without prejudice to the foregoing provisions of this section, in the case of agro-processing societies or any other society for which a definite zone or an area of operation is allotted by the State Government or the Registrar, it shall be

obligatory on the pat of such society to admit, on an application made to it, every eligible person from that zone or the area of operation, as the case may be, as a member of such society, unless such person is already registered as a member of any other such society, in the same zone or the area of operation.]"

10. In so far as the aforesaid contentions are concerned, in my opinion the same lacks total merit. Firstly, power under section 22 (2) and 23 (2) is the power conferred on the Registrar Co-operative Societies which is the same authority namely, Deputy Registrar of Cooperative Societies. The power conferred of determination whether there is a deemed membership or not and the power conferred under section 23(2) that whether the refusal of the membership is valid or not, in my opinion, is nothing but identical power to determine whether a person is entitled to be a member of the society or not. The provisions of section 22 (2) and 23(2) only provide for only two different modes for the same cause of action as to become a member of a particular society. The authority prescribed under section 22 (2) and under section 23 (2) being both identical, in my opinion, the Registrar while exercising the power under section 22 (2) is also equally empowered to consider, if there is a

refusal, whether the refusal of the membership is legal and valid. I am also of the further opinion that Section 22 (2) and 23 (2) of the Maharashtra Cooperative Societies Act is a complete scheme for becoming a member of the society. It provides that society's membership is an open membership and every person is entitled to become a member of the society. It also provides two modes to become member of the society (i) where there is an inaction on the part of the society to take decision on an application for membership and (ii) where an action is initiated and a decision is taken and the validity of the decision is under scrutiny. This, in my opinion is a complete scheme alternatively providing that by virtue of inaction or by virtue of an illegal action if the membership is refused by the society then Registrar is empowered to take action in the matter. The contention of the learned counsel for the petitioner that it is a separate scheme by itself and, therefore, the Registrar exercising power under section 22 (2) and under Section 23 (2) exercises a totally different power one in case of original power and another in case of appellate power and, therefore, both the proceedings must be treated as separate, independent and distinct. In my opinion, the contention is devoid of any merit. It is because under Section 23 (1A)(2) the power is conferred on the Registrar to determine whether there is a deemed membership or

not. If this power under Section 23 (1A) in contrast to the power under section 22 (2) of the Maharashtra Co-operative Societies Act is conferred on the basis that where the society has accepted the application but did not take decision then the power under section 22 (2) can be exercised. But where the society refuses to accept the application itself for membership, then the application can be filed with the Registrar who will forward the same to the society for taking action and if action is not taken, a person becomes a deemed member and if any dispute arises about the deemed membership in such a case, then under section 23 (1A) the Registrar is empowered to determine the said dispute. In my opinion, section 22(2) and 23(2) is required to be harmoniously interpreted. I am of the opinion that the power of the Registrar under section 22 (2) and 23 (2) is identical and he is exercising the very same jurisdiction thus in my opinion he is entitled to determine whether a person is entitled to become a member of any co-operative society or not. The contention of the learned counsel that the application of the petitioner has been rightly rejected because he was not entitled to be a deemed member and the Deputy Registrar wrongly entered into the arena of the fact of refusal is valid or not therefore, cannot be accepted.

11. Apart from the aforesaid provision of law, I

am of the further opinion that on the facts of the present case there is also refusal of the membership which has been admitted and reiterated by the respondent no. 1 in the written statement filed before the Deputy Registrar and in para 3 which has been reproduced hereinabove. In light of the stand of the respondent no. 1 society itself that there was a refusal of the membership and therefore there is no question of deemed membership, the Registrar was right and justified in going into the legality and validity of such refusal by the respondent no. 1 society and was entitled to consider the same and arrive at, on the proper appreciation of facts, a conclusion. Further, in my opinion, the argument of the learned counsel for the respondent no. 1 is required to be rejected for one more reason. It is because that both the Deputy Registrar as well as the Divisional Joint Registrar have proceeded on the footing that there is a refusal of membership by the respondent no. 1 of the petitioner to the said society and therefore the said refusal is required to be looked into on merits. Even the Divisional Joint Registrar who has passed an order in favour of the respondent no. 1 society has in para 4 on page 122 of the petition given a finding after considering the power of the Deputy Registrar that the refusal is valid because the construction of the 16th floor by the builder is contrary to the provisions of Section 7 of the Maharashtra Ownership

Act, 1963 and, therefore, the respondent no. 1 has rightly not made the petitioner a member of the said society. In the light of the fact that Divisional Joint Registrar having held as aforesaid, it is not possible to accept the contention of the learned counsel for the respondent no. 1 society that the application was only for deemed membership and the authorities ought not to have gone into the validity or otherwise of the action of the respondent no. 1 society on merits of the case.

12. Now turning to the merits of the case, I find that the order passed by the Deputy Registrar was legal and valid and justified. It is not open for any society to refuse membership on the ground that the construction which has been carried out by the builder is unauthorised and in contravention of the provisions of Section 7 of the Maharashtra Ownership Flats Act, 1963. Whether the construction is authorised or unauthorised is a matter which is a matter of civil dispute and has to be determined by the Civil Court and neither the co-operative society nor the Deputy Registrar nor Divisional Joint Registrar is empowered to go into the aforesaid issue at all for determining whether a person is entitled to be a member or not. In my opinion, a membership of the society has to be considered only on the rules, regulations and bye-laws and not on the basis of external factors such as whether the

construction of the premises which is sought to be purchased by him is legal, illegal or authorised or unauthorised. In my opinion, the issue as to the validity of the construction is expressly required to be determined by the civil court and till such determination is made, the society as well as the authorities are not entitled and/or justified in refusing to grant membership to a person. In the present case even the construction is according to the sanctioned plans and the plans are sanctioned by the B.M.C. in respect of the premises namely office no. 1601 which the petitioner has sought to purchase from the Income-tax Authorities in auction sale. However, the contention is that the sanction by the Corporation is illegal because it is being done without the consent of the premises purchasers under section 7 of the Maharashtra Ownership of Flats Act, 1963. In my opinion, such a dispute is not within the jurisdiction of the Deputy Registrar and Divisional Joint Registrar to determine and the society is also not empowered to refuse the membership on such a contention. If the office is constructed by breach of any provisions of law by the builder then the remedy is by way of a suit which in the present case is already preferred and pending in this Court. It is not open for the society to reject the membership on the aforesaid ground. In the present case the Divisional Joint Registrar while exercising the power of revision

under section 154 of the Maharashtra Co-operative Societies Act has in fact upheld the refusal of the membership on such a ground which in my opinion is totally illegal and without authority of law. That decision is outside the purview of the Divisional Joint Registrar while determining under the provisions of Section 22 (2) and 23 of the Act that whether a person is entitled to be a member or not of any society. In my opinion, therefore, the present petition must succeed. The petition is, therefore, allowed. The order passed by the Divisional Joint Registrar dated 6.9.2001 is set aside and the order passed by the Deputy Registrar dated 18/5/1998 is confirmed. Petition is made absolute accordingly. However, there shall be no order as to costs.

13. The learned counsel appearing for the respondents seeks stay of the order for a period of four weeks. Stay granted for a period two weeks.